Supreme Court, U.S.
FILED

(1)

011865 JUN 20 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

MEREDITH ODEN,

Petitioner,

v.

NORTHERN MARIANAS COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS F. CUSHNIE
Attorney for Petitioner
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

174558

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

29 pp

QUESTION PRESENTED

Whether the Ninth Circuit's judgment should be vacated due to the participation of a non-Art. III judge?

Petitioner, Meredith Oden (Oden) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 22, 2002.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 284 F.3d 1058. The opinion of the District Court was entered October 22, 1999 and not reported.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered March 22, 2002. Jurisdiction is conferred on this court to review the judgment in question on a writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III, § 1

> The Judges . . . of the . . . inferior Courts, shall hold their Offices during good Behavior. . . .

U.S. Const. art. III, § 3, cl. 2

> The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory . . .

28 U.S.C. § 43(b)

> Each court of appeals shall consist of . . . circuit judges. . . .

28 U.S.C. § 44(b)

Circuit judges shall hold office during good behavior.

28 U.S.C. § 132(a)

There shall be in each judicial district a district court . . .

28 U.S.C. § 132(b)

Each district court shall consist of the district judge . . . for the district. . . .

28 U.S.C. § 133

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

28 U.S.C. § 134(a)

The district judges shall hold office during good behavior.

28 U.S.C. § 292(a)

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

48 U.S.C. § 1424(a)

The judicial authority of Guam shall be vested in a court of record established by Congress . . .

48 U.S.C. § 1424(b)

The District Court of Guam shall have the jurisdiction of a district court of the United States.

48 U.S.C. § 1424b(a)

The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court of Guam . . . for a term of ten years . . .

THE CASE

Oden filed her action against the Northern Marianas College alleging violations of Title IX (20 U.S.C. § 1681). Jurisdiction lay in the District Court under federal question jurisdiction (28 U.S.C. § 1331). Oden's claims were dismissed in a summary judgment proceeding on April 29, 1999 by the District Court. Oden appealed to the United States Court of Appeals for the Ninth Circuit. The summary judgment was affirmed.

The panel which heard and determined the appeal consisted of two circuit judges and the "Chief District Judge for the District of Guam, sitting by designation."

REASON FOR GRANTING THE WRIT

Article II, Section 1 of the U.S. Constitution provides in part that "[T]he judges . . . of the inferior courts, shall hold their offices during good behavior . . ." Each court of appeals ". . . consist[s] of . . . circuit judges . . ." (28 U.S.C. § 43(b)). "Circuit judges shall hold office during good behavior." (28 U.S.C. § 44(b)). "The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires." (28 U.S.C. § 292(a)). There are statutes which authorize the designation and assignment of other Article III judges. *See* 28 U.S.C. § 252 ("Judges of the Court of International Trade shall hold office during good behavior"). The judge of the District Court of Guam is not an Article III judge. He does not hold office during good behavior but rather hold office "for a term of ten years". 48 U.S.C. § 1424b(a). He presides over a territorial court. Vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a "District Court of the United States". *Mookini v. United States*, 303 U.S. 201, 205 (1938). The District Court of Guam was created under Article IV, § 3 of the Constitution, not Article III. *Guam v. Olson*, 431 U.S. 195, 196 n.1 (1977).

"Each district court . . . consist[s] of the district judge . . . for the [judicial] district . . ." (28 U.S.C. § 132(b)). Judicial districts are listed under 28 U.S.C. § 133(a). Guam is not so listed.

The Ninth Circuit panel hearing Oden's appeal was not properly constituted. *See Ryder v. United States*, 515 U.S. 177, 188 (1995) determining the Court of Military Appeals erred in according defacto validity to actions of civilian judges of the Coast Guard Court of Military Review. *See* also *Gliden Company v. Zdanok*, 370 U.S. 530 (1962).

This court has previously addressed the issue of review by Article III courts holding that "we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Article III courts, including this court, of decisions of territorial courts in cases that may turn on questions of federal law." *Guam v. Olson*, 431 U.S. 195, 201 (1977).

CONCLUSION

The Ninth Circuit panel hearing Oden's appeal was not properly constituted having not been entirely composed of Article III judges. Oden requests that this court exercise its supervisory powers by granting this petition.

Respectfully submitted,

DOUGLAS F. CUSHNIE
Attorney for Petitioner
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843